# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 72-1429

EDWARD GEORGE BOOZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**MEMORANDUM FOR THE UNITED STATES IN OPPOSITION**

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Petitioner contends that the judge's conduct of the trial was so prejudicial as to deny him a fair trial; that the judge was personally biased and should have disqualified himself; and that the evidence was insufficient to sustain his conviction.

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on three counts of armed robbery of a federally insured bank, in violation of 18 U.S.C. 2113(a), (b), and (d). On appeal, the conviction was reversed, 451 F. 2d 719 (C.A. 3), and the case remanded to the district court for retrial. On retrial petitioner was again convicted. He was sentenced to a term of imprisonment for ten years and a fine of $5,000. The court of appeals affirmed (Pet. App. A).

On April 18, 1967, the Bucks County Bank and Trust Company in Dublin, Pennsylvania, was robbed. Twenty-five bait bills in twenty dollar denominations were taken during the course of the robbery (Tr. sec. 4 at 26, 29).[1]

The robbery was committed by two men, both wearing ski masks, dark glasses and gloves; they were carrying guns (Tr. sec. 3 at 50-52; sec. 4 at 16-17). In addition, one robber wore an old felt hat and a raincoat (Pet. App. F at 32-33; Tr. sec. 4 at 16-17). The robbers had apparently forced entry into the building (Tr. sec 4 at 27-29) during the night. Upon arrival each employee was accosted, taken to the basement, tied and blindfolded (Tr. sec. 3 at 51-53; sec. 4 at 21).

Without asking if he knew the combination, the robbers selected assistant manager Donald P. Worthington, and took him upstairs to open the vault (Tr. sec. 4 at 22-23). The first part of the combination was known only to bank manager Ernest Moyer, who usually would arrive first at the bank and immediately dial his numbers (Tr. sec. 3 at 54-55). Worthington would customarily arrive fifteen or twenty minutes later and dial his numbers, and then physically open the vault (Tr. sec. 3 at 54-55). Since Moyer had not had a chance to dial his half of the combination, Worthington was unable to open the vault when taken upstairs by the robbers (Tr. sec. 4 at 23-24). Worthington was then brought back down to the basement, and Moyer was taken up and forced to dial the first numbers (Tr. sec. 3 at 53-54; sec. 4 at 23-24). Immediately

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[1] "Tr." designates the transcript, a copy of which is being filed with the Clerk of this Court. Each day of the trial is numbered separately, and each is designated as a separate section.

afterwards Worthington was again taken upstairs and forced to dial the final numbers and open the safe (Tr. sec. 4 at 24-25).

Petitioner had been doing business at this branch of the bank for several years (Tr. sec. 3 at 93). Over the years, his business had brought him to the bank approximately once a month, but in the two or three weeks preceeding the robbery, he was seen there approximately twice a week (Tr. sec. 4 at 90-91). He was seen making an examination of the area where the forced entry was later made (Tr. sec. 4 at 98-99). In addition, Worthington observed petitioner looking at him through the back windows of the bank prior to business hours while he dialed the second half of the combination and opened the safe (Tr. sec. 4 at 37).

The robbers fled the scene in a car belonging to one of the tellers. They left it on an abandoned, overgrown dirt road a few miles away (Tr. sec. 4 at 27; sec. 5 at 9-10). On the morning of the robbery a tan compact car, probably a Corvair, was observed parked along the road where the getaway car was abandoned (Tr. sec. 4 at 128-129). On the afternoon subsequent to the robbery, an F.B.I. search of the field adjacent to the parked car yielded a man's hat of the same description as the one worn by one of the robbers (Tr. sec. 4 at 74-75; sec. 5 at 13, 14). It was found approximately twenty-five feet from where the tan automobile had been parked (Tr. sec. 5 at 14-15).

Three days following the robbery, a local farmer observed a white pick-up truck parked at the approximate location where he had seen "police activity" the day or so before (Tr. sec. 5 at 71-74). The driver got out, looked around in the field, and got back in the truck

and drove off (Tr. sec. 5 at 84-85). The farmer attempted to record the license number of the white truck as it drove off, repeating the number to himself as he walked back the distance to his tractor and then writing it in the dust on the hood (Tr. sec. 5 at 85-87). The number he noted was SO633 (Tr. sec. 5 at 89). At the time of the robbery, petitioner owned a white Chevrolet pick-up truck with the license number S6003R (Tr. sec. 5 at 125, 128, 145).

On June 6, 1967, petitioner deposited $5,500 in his account at the Frankford Avenue Branch of the Gerard Trust Bank (Tr. sec. 5 at 110-113). Among the bills deposited were eighteen bills contained on the bait list (Tr. sec. 5 at 153-155). Petitioner claimed that he received the money from sources other than the robbed bank (Tr. sec. 5 at 21-22).

1. Petitioner contends that the trial judge's conduct of the trial was so prejudicial as to constitute reversible error. However, the judge's remarks cited by petitioner (Pet. App. F at 35-37) were provoked by defense counsel's tactic of constantly making unsustainable objections to virtually every question put by the government, and of requesting bench side conferences every few minutes. While, as the court below noted, the judge's comments may have fallen "short of desirable judicial fastidiousness," they did not express an opinion as to petitioner's guilt or innocence and were not of such a nature as to require a mistrial. In his final charge to the jury, moreover, the judge stated that it was up to the jury to determine the facts in the case (Tr. sec. 7 at 4).

2. Petitioner contends that the trial judge exhibited personal prejudice and should have disqualified himself. Petitioner's counsel filed a motion seeking to disqualify

the judge who heard petitioner's first trial from hearing the case on remand. The only stated basis for this motion was that the First and Second Circuits have a rule automatically reassigning a case on remand. At the January 7, 1972, hearing on this motion, petitioner's counsel first raised the issue of judicial bias as a ground for disqualification. Counsel's argument was based on the following exchange of remarks made at the time petitioner was sentenced after his first trial (Tr. sec. 1 at 4):

> THE COURT: * * * In my opinion he had a fair trial. There was ample evidence to convict him. The jury found him guilty. His attitude since has been anything but favorable to him. He has been belligerent, to put it mildly, with the Probation Department. He has threatened that if he did get probation he wouldn't cooperate with them.
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> THE DEFENDANT: That is not true, sir.
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> THE COURT: Well, you say it isn't. I believe them. I don't believe you. I didn't believe you at the trial and I don't believe you now.
>
> He has also said that if he is sentenced to jail he will abscond. Now, you needn't believe that and he needn't believe it, but I have been in this court a long while and I believe the probation officers.

It is well settled that under 28 U.S.C. 144 the same judge who heard the original trial can also hear the case on remand. *Dukes* v. *United States,* 407 F. 2d 863 (C.A. 9), certiorari denied, 396 U.S. 897. This Court has, moreover, held that "bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States* v. *Grinnell Corp.,* 384 U.S. 563,

583. Since there is no allegation here that the judge formed his opinion of petitioner's credibility by using extrajudicial sources, the denial of petitioner's motion to disqualify the trial judge was correct.

3. Petitioner contends that the evidence was circumstantial and equally consistent with innocence as with guilt, and therefore insufficient for conviction. This contention is answered by the facts. Petitioner's further argument that where the evidence is circumstantial, it must be such as to exclude every reasonable hypothesis other than guilt for a conviction to be valid is without merit. *Holland* v. *United States,* 348 U.S. 121, 139-140.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

JULY 1973.

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